

1 JAMES T. HANNINK (131747)
jhannink@sdlaw.com
2 ZACH P. DOSTART (255071)
zdostart@sdlaw.com
3 DOSTART HANNINK & COVENEY LLP
4180 La Jolla Village Drive, Suite 530
4 La Jolla, California 92037-1474
Tel: 858-623-4200
5 Fax: 858-623-4299

6 Attorneys for Plaintiff

7
8 UNITED STATES DISTRICT COURT
9 SOUTHERN DISTRICT OF CALIFORNIA
10

11 HONEY McEWAN, individually and
on behalf of all others similarly situated,

12 Plaintiff,

13 vs.

14 OSP GROUP, L.P., a Delaware
15 Limited Partnership, OSP GROUP
16 MERCHANT, INC., a Delaware
17 Corporation, OSP GROUP, INC., a
Delaware Corporation, OSP GROUP,
18 LLC, a Delaware Limited Liability
Company, and DOES 1-50, inclusive,

19 Defendants.
20
21
22
23
24
25
26
27
28

CASE NO. 3:14-cv-02823 BEN (WVG)

**SECOND AMENDED CLASS
ACTION COMPLAINT FOR
VIOLATION OF THE
CALIFORNIA INVASION OF
PRIVACY ACT
[Cal. Penal Code § 630 *et seq.*]**

GENERAL ALLEGATIONS

1. Plaintiff Honey McEwan (“McEwan”) is an individual residing in Healdsburg, California. Plaintiff Susan Cameron (“Cameron”) is an individual residing Orange, California. McEwan and Cameron are collectively referred to as “Plaintiffs.”

2. Plaintiffs are informed and believe and thereon allege that defendant OSP Group, L.P. is a Delaware limited partnership that does business in this judicial district.

3. Plaintiffs are informed and believe and thereon allege that defendant OSP Group Merchant, Inc. is a Delaware corporation that does business in this judicial district.

4. Plaintiffs are informed and believe and thereon allege that defendant OSP Group, Inc. is a Delaware corporation that does business in this judicial district.

5. Plaintiffs are informed and believe and thereon allege that defendant OSP Group, LLC is a Delaware limited liability company that does business in this judicial district.

6. Plaintiffs do not know the names of the defendants sued as DOES 1 through 50 but will amend this complaint when that information becomes known. Plaintiffs allege on information and belief that each of the DOE defendants is affiliated with each named defendant in some respect and is in some manner responsible for the wrongdoing alleged herein, either as a direct participant, or as the principal, agent, successor, alter ego, or co-conspirator of one or more named defendants. For ease of reference, plaintiffs will refer to the named defendants and the DOE defendants collectively as “defendants.”

7. Defendants OSP Group, L.P., OSP Group Merchant, Inc., OSP Group, Inc., and OSP Group, LLC removed this lawsuit to this Court pursuant to 28 U.S.C. § 1332(d) (CAFA jurisdiction). Venue is proper in this judicial district because

1 defendants have not designated principal offices in California and at least some of
2 the events giving rise to the class claims occurred in this judicial district.

3 8. During the applicable statute of limitations, while plaintiff McEwan
4 resided in and was physically present in the State of California, and while she was
5 using a cordless telephone, McEwan had one or more telephone communications
6 with defendants' representatives.

7 9. During the applicable statute of limitations, while plaintiff Cameron
8 resided in and was physically present in the State of California, and while she was
9 using a landline telephone, Cameron had one or more telephone communications
10 with defendants' representatives in which she provided confidential personal and
11 financial information to defendants, including her address and credit card
12 information.

13 10. Plaintiffs allege on information and belief that defendants secretly
14 recorded these communications. Defendants did not notify McEwan or Cameron
15 that defendants were recording the communications, nor did defendants obtain
16 plaintiffs' consent.

17 11. Plaintiffs allege on information and belief that, during the applicable
18 statute of limitations, defendants routinely recorded incoming and outgoing
19 telephone communications with customers who resided in and were physically
20 present in the State of California without notifying the customers that the
21 communications were being recorded.

22 12. California Penal Code § 632 prohibits the recording of a confidential
23 communication made by telephone without the consent of all parties to the
24 communication. California Penal Code § 632.7 prohibits the recording of any
25 communication without the consent of all parties where one of the parties to the
26 communication is using a cordless or cellular telephone.

27 13. Defendants' practice of surreptitiously recording telephone
28 communications violates Penal Code §§ 632 and 632.7.

CLASS ACTION ALLEGATIONS

14. Plaintiffs bring this lawsuit as a class action under Fed. R. Civ. P. 23. The class (“Class”) plaintiffs seek to represent is defined as follows: “All natural persons who, while residing in and physically present in the State of California, and during the applicable statute of limitations: (1) participated in at least one telephone communication with a live representative of defendants that was recorded by defendants; (2) were not notified by defendants that their telephone communication was being recorded; and (3) are identifiable through records held by defendants and/or third parties. Excluded from the class are all employees of defendants, all attorneys and employees of defendants’ counsel, attorneys and employees of plaintiff’s counsel, and the judicial officers to whom this matter is assigned and their respective court staff.”

15. Ascertainability. The members of the Class may be ascertained by reviewing records in the possession of defendants and/or third parties, including without limitation defendants’ call records, customer records, call lists, and the secret recordings themselves.

16. Common Questions of Fact or Law. There are questions of fact or law that are common to the Class, which predominate over individual issues. These common questions include, without limitation: (1) defendants’ policies and procedures for recording telephone communications with customers in California; (2) whether defendants notify their customers that the customers’ telephone communications are recorded; (3) whether defendants’ conduct constitutes a violation of Penal Code §§ 632 and/or 632.7; (4) defendants’ recordkeeping practices; and (5) the appropriate remedies for defendants’ conduct.

17. Numerosity. The Class is so numerous that joinder of all Class members would be impracticable. Plaintiffs are informed and believe that the Class consists of at least 100 members.

19. Superiority. A class action is superior to other methods for resolving this controversy. On information and belief, because defendants' recording activity is not disclosed, class members are unlikely to be aware of their claims. Moreover, because the damages suffered by each Class member are low, the expense and burden of individual litigation would make it impracticable for members of the Class to redress the wrongs done to them. Class certification will also conserve judicial resources and avoid the possibility of inconsistent judgments.

14 (Violation of Cal. Penal Code § 630 *et seq.*)

21. Plaintiffs allege on information and belief that, within the applicable statute of limitations, plaintiffs and the Class members, while residing in and physically present in the State of California, participated in telephone communications with live representatives of defendants, which communications were recorded by defendants without the consent of plaintiffs and the Class members. Defendants did not notify plaintiff Cameron or Class members that the communications were being recorded.

1 communications were being recorded. Defendants violated § 632 by intentionally
 2 recording the communications with plaintiff Cameron and other Class members who
 3 used a landline telephone without obtaining their consent.

4 23. Penal Code § 632.7 prohibits the intentional recording of a
 5 communication without the consent of all parties where at least one of the parties to
 6 the communication is using a cellular or cordless telephone. Defendants violated
 7 § 632.7 by intentionally recording the communications with plaintiff McEwan and
 8 other Class members who used a cordless or cellular telephone without obtaining
 9 their consent.

10 24. As a result of defendants' conduct, plaintiffs and the Class members
 11 have been injured. Accordingly, plaintiffs and the Class members are entitled to
 12 statutory damages of \$5,000 per recorded communication pursuant to Penal Code
 13 § 637.2(a)(1) and injunctive relief to halt the secret recording of communications
 14 pursuant to Penal Code § 637.2(b).

15 **PRAYER**

16 WHEREFORE, plaintiffs pray for judgment against defendants as follows:

- 17 1. For statutory damages as alleged herein;
- 18 2. For injunctive relief as alleged herein;
- 19 3. For costs of suit;
- 20 4. For pre-judgment interest; and
- 21 5. For such other relief as the Court may deem just and proper.

22
 23 Dated: December 30, 2015

DOSTART HANNINK & COVENEY LLP

24
 25 /s/ James T. Hannink

26 JAMES T. HANNINK
 27 Attorneys for Plaintiffs
 28

744159.2